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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-8

UNITED STATES OF AMERICA,
Petitioner,

v.

HERMAN RADDATZ,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE
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BRIEF FOR RESPONDENT

QUESTION PRESENTED

Whether, in making a de novo determination pursuant to 28 U.S.C. §636 (b) (1) (C), of a motion to suppress evidence initially heard by a magistrate, in which the testimony of the witnesses is conflicting and credibility is critical to the disposition of contested issues, a district judge may properly decline to hear evidence and rely solely on the written record of the proceedings before the magistrate.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

1. Article III, Section 1 of the United States Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

2. The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

3. 28 U.S.C. §636 (b) (1) provides:

> (b) (1) Notwithstanding any provision of law to the contrary –
>
> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment

> or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.
>
> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

STATEMENT OF THE CASE

On March 31, 1977, in the United States District Court for the Northern District of Illinois, a one count indictment charging a violation of 18 U.S.C. §922 (h), receipt of a firearm by a convicted felon, was returned against respondent, Herman Raddatz. (R. 1.)[1] To prove where and when Raddatz received the firearm, the Government relied on a statement made by Raddatz to agents of the Bureau of Alcohol, Tobacco and Firearms on January 12, 1977. (Pet. App. 36a-37a.)

Raddatz moved to suppress this and two other statements the Government alleged he had made. (R. 10, 22.) On June 9, 1977, the district judge, pursuant to 28 U.S.C. §636 (b) (1) (B), referred the motion to the executive committee of the court for assignment to a magistrate for a hearing on the motion and the preparation of proposed findings and a recommendation as to disposition.[2] Respondent objected to the reference. (R. 25.) The motion was assigned by lot to Magistrate Carl Sussman. (R. June 17, 1977.)

The magistrate held on evidentiary hearing. Raddatz testified that two federal firearms agents, Paul Russell

[1] "R." refers to the district court's index of record. "Pet. App." refers to the Appendix to the Government's Petition for Certiorari. "App." refers to the Government's separate appendix. "Tr." refers to the transcript of the hearing on respondent's motion to suppress evidence before the magistrate.

[2] Unless otherwise indicated, references to the Federal Magistrates Act, 28 U.S.C. §631 *et seq.*, will be cited to the Act as amended in 1976 and in force prior to the 1979 amendments. *See* Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643. The 1976 version of the Act currently appears in the supplement to Title 28, United States Code Annotated. Section 636 (b) (1), which was the source of authority for the reference in this case, was not affected by the 1979 amendments.

and Richard McCulloch, had promised him that they would secure the dismissal of a forthcoming federal indictment against him if he provided them with information concerning his acquisition of a certain firearm. In his statement of January 12 he provided the requested information. The agents denied the promise. The evidence was conflicting and credibility was critical to the determination of the facts. At the conclusion of the hearing, the magistrate ordered the parties to submit proposed findings of fact and conclusions of law. (Tr. 256.) On November 1, 1977, he transmitted his report to the district court, recommending that the motion be denied and that the distrct court adopt the Government's proposed findings of fact as the court's findings. (R. 36; Pet. App. 41a.) Respondent objected to the magistrate's recommendation. The district judge, without hearing any evidence, adopted the magistrate's recommendation, adopted the Government's proposed findings as the court's findings and denied the motion to suppress. (R. 42, 46, 54; Pet. App. 33a-34a.)[3]

No other issues were contested. Raddatz waived a jury and the evidence at trial was presented by a stipulation which included Raddatz' statements. (Pet. App. 32a, 35a-37a.) Raddatz was found guilty and sentenced to six months' incarceration and a period of probation of four and one-half years. (Judgment Order of June 15, 1978.)

The United States Court of Appeals for the Seventh Circuit, in a unanimous decision, reversed and remanded

[3] Two days after the magistrate transmitted his report and recommendation to the district judge who had ordered the reference, the case was transferred to a judge who had just joined the court. (R. Nov. 7, 1977.) Respondent's proposed findings of fact and conclusions of law were treated as objections. (Tr. Jan. 26, 1978, at 5.) At a later date, respondent was given leave to file a document specifically designated as objections. (R. 44-46.)

the case for a hearing on the motion to suppress before the district court. The court of appeals' decision consisted of a number of interrelated holdings:

(1) The court of appeals found that the Magistrates Act, in particular §28 U.S.C. §636 (b) (1) (C), required the district judge to make a de novo determination of contested aspects of the magistrate's report. The court held that because the Act required a de novo determination, it did not violate Article III of the Constitution. (Pet. App. 14a.)

(2) The court of appeals reviewed the record of the suppression hearing – the same record that was before the district court. It outlined the conflicting evidence at length and concluded that in the circumstances of this case, the district judge could not make a reliable de novo determination of the contested issues without the benefit of seeing and hearing the witnesses testify. The court observed, "The record here does not reveal a pattern of facts that exposes the defendant's testimony as wholly incredible. Thus the truth cannot be derived from this written record without an intolerably high margin of error . . . ." (Pet. App. 2a-7a, 18a.)

(3) The court of appeals found that Congress did not require the trial court to decide the motion on the basis of record review alone, but gave the court the power to recall witnesses. Hence, it held, the Act itself does not violate due process. (Pet. App. 24a.) Because of the importance of credibility to the determination of the motion in this case, however, the district court could not "exercise its discretion to refuse to hold a hearing on contested issues of fact . . ." consistently with the demands of due process. (Pet. App. 2a-7a, 19a, 24a.)

STATEMENT OF FACTS

The only evidence taken in this case, besides the trial stipulation, was taken at the suppression hearing before the magistrate.

1. The Evidence at the Suppression Hearing

The Government's statement of facts indicates that there was a conflict between the testimony of Raddatz and the two federal agents who testified at the hearing. The Government fails to report, however, significant discrepancies in the agents' testimony which not only cast doubt on their credibility, but make it virtually impossible to determine – even if the Government's evidence alone is considered – what the agents told Raddatz and what led to Raddatz' statement of January 12, 1977. These discrepancies must be considered in determining whether the district court could make a meaningful determination of the facts based solely on the record. A fuller exposition of the evidence than that contained in the Government's brief is therefore essential.

On August 8, 1976, Chicago police officers Monroe Vollick and James Bach arrested Raddatz for possession of a firearm. (Tr. 13, 19.) A formal charge based on this incident was filed against Raddatz in the state court. The state gun charge remained pending until February 22, 1977, when it was dismissed. (Tr. 20, 156-157, 249.)

On November 19, 1976, two federal firearms agents, Paul Russell and Richard McCulloch, went to Raddatz' home to question him. Prior to this date, through discussions with Officers Vollick and Bach and telephone calls to the state court, the agents had learned of the pending state gun charge. (Tr. 38-39.) The agents had also determined, in an interview with Officer Vollick on November 4, that he had recovered the firearm involved in that

charge from Raddatz' possession. (Tr. 174.) The agents had also learned that Raddatz was a convicted felon and that the firearm with which he had been arrested had previously moved in interstate commerce. (Tr. 175.)

Raddatz testified concerning the events of November 19 as follows: When Agents Russell and McCullock came to his home, they introduced themselves and Agent Russell read him rights from a card. Agent Russell told him that the agents had information that the gun with which he had been arrested had been used in a homicide in another state and that they were seeking his cooperation in telling them how he had obtained it. (Tr. 107.) Agent Russell also told him that a federal indictment was going to be handed down against him, but if he agreed to assist the agents, "somebody would talk to the prosecutor, and it would be dismissed." If he failed to cooperate, Agent Russell told him, he could find himself "going to the Federal penitentiary for a long time." (Tr. 103-108.) Agent Russell also talked to him about the possibility of his becoming a firearms informant, and told him that if he worked for the agents on an ongoing basis, he would be paid and his family would be relocated. (Tr. 108-109.)

Raddatz stated that he told the agents on November 19 that he had gotten the gun from Jimmy Batson.[4] He testified that this was not truthful information, but he said it because he was unsure whether he should trust the agents. (Tr. 110-111.) He testified that the agents left a card with him, and that after he "had thought about what they told me," he decided "[t]o help myself, as they said they would help me." (Tr. 111.)

[4] Raddatz was with Jimmy Batson when he was arrested by the local police on August 8. (Tr. 8.)

Accordingly, on what was determined to have been January 12, he called the agents. They picked him up and brought him downtown. (Tr. 111-112.)[5] Raddatz testified as follows concerning his meeting with the agents on January 12:

Q. Did you make a statement on that occasion concerning the gun?

A. Yes, I did.

Q. Was it the same statement you had given earlier or a different statement?

A. Different statement.

Q. Why did you make that statement?

A. Because of the promise they made to me.

Q. Now, on that occasion was there any discussion again about that promise?

A. Yes, there was.

Q. What was that?

A. From Mr. Russell.

Q. What did he say?

A. He asked me what I had for him, and I first asked him, 'What you are going to do for me, is it real?' He said yes . . . . (Tr. 113.)

Raddatz explained that he gave the January statement because of what the agents told him on the earlier occasion at his home:

[5] The agents testified that Raddatz was advised of his rights on January 12. However, both testified that had he been so advised, the typed version of his statement would so indicate. (Tr. 182, 205.) Agent Russell, who reduced the January 12 statement to writing, acknowledged that the typed version does not so indicate. (Tr. 183.)

> [T]hey told me to think about this, that it would benefit me if I did cooperate – when this Federal indictment would be handed down it would be dismissed if I would cooperate with them and give them knowledge as to this gun. (Tr. 123.)

Raddatz testified that on a subsequent occasion, he gave the agents information about someone he knew who was involved in guns and took Agent McCulloch to a place where "[g]uns were being sold on the streets." (Tr. 114-115.) On another occasion, he called the agents and they told him to come downtown. He did so, accompanied by his former wife and her children. On that occasion, he met with the agents' supervisor and was given $50. (Tr. 120, 122.)

Both agents were called by the Government in rebuttal.[6] Their respective testimony as to the reason for seeking to talk to Raddatz on November 19 differed. Agent Russell stated that the agents were investigating a homicide:

> This gun – last known owner of this gun was Mr. Hurley. So we went to talk to Mr. Raddatz to ascerhe was deceased – a victim of an unsolved homicide. This gun – last known owner of this gun was Mr. Hurley. So we went to talk to Mr. Raddatz to ascertain where he got it . . . and also, you know, anything that we could find out about it. (Tr. 168.)

Agent McCulloch testified, however, that the purpose of the interview was to attempt to induce Raddatz to provide the agents with the only information they lacked for a §922 (h) prosecution against him – "venue":

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[6]Agent Russell had also testified briefly prior to Raddatz' testimony. (Tr. 33-48.)

> Q. So it is correct, is it not, that at the time you and Agent McCulloch [sic] went out to Herman Raddatz' home on November 19, that the only thing you were lacking for a 922 (h) prosecution of Mr. Raddatz was venue; that is where it was that he received the gun?
>
> A. Right. It's known procedure in cases like this that the agents from ATF interview the subject to determine venue. (Tr. 215.)

Contrary to Raddatz' testimony that the agents told him he was going to be indicted, Agent Russell persistently denied that on November 19 he viewed Raddatz as a potential target of a federal prosecution. He denied that he told Raddatz on November 19 that he would be indicted, stating that as of November 19, "I had no case." Raddatz became a target of a potential prosecution, Russell testified, only after his statement of January 12, (Tr. 183-184, 168-169, 175-176, 178.)

Agent Russell denied that he ever discussed cooperation with Raddatz relative to this or any other case. (Tr. 160-161.) He stated that while he talked to Raddatz about the history of the gun with which Raddatz was arrested, he never talked to Raddatz about setting up gun transactions or providing information about gun sales in the City of Chicago. (Tr. 185.)

At other times during the hearing, however, Agent Russell testified, only after his statement of January 12. November 19 about Raddatz' criminal liability, about cooperation and "helping himself." Agent Russell testified that he told Raddatz on November 19 that he "was investigating the incident that occurred on August 8, and also the weapon, as to where he had acquired it." (Tr. 41.) He testified:

> We asked him if he knew where Batson had gotten the gun. He said he did not know. We asked him if he could find out. Because he was involved in the case it would help his chances if he helped us find out where he had gotten it from, and any other gun. (Tr. 42.)

And later, he commented that he told Raddatz that if Raddatz cooperated in helping the agents find Batson:

> I would mention it to the United States Attorney, that he had assisted us in the case, in the event the case developed at that time. It was still in the investigative stages. (Tr. 165.)

Despite Agent Russell's insistence that he "had no case" against Raddatz on November 19, Agent McCulloch testified that on November 19 Agent Russell told Raddatz that he had been in violation of federal law when he was arrested with a firearm on August 8. (Tr. 217-218.) While he could not recall Agent Russell's exact words or whether or not Raddatz was expressly informed that he would be indicted, he remembered that Raddatz acknowledged that he was in serious trouble. (Tr. 218-219.)

Following the November 19 interview, when according to Agent Russell's testimony Raddatz was not a target, the agents proceeded to prepare their §922 (h) case. They obtained copies of Raddatz' fingerprints from the Chicago police in order "to prove that he was indeed the same individual that had the gun on August 8, and that he was a convicted felon." (Tr. 217.) Agent McCulloch testified that the agents took this step in preparation for a §922 (h) prosecution. (Tr. 217.)

Between November 19 and January 12, Raddatz called the agents on numerous occasions. (Tr. 45, 206-207.)

They finally got together on January 12. Agent Russell testified that this visit was completely unsolicited. (Tr. 187.) Raddatz retracted his previous statement and provided the agents with detailed information concerning the prior history of the firearm. (Tr. 179-181, 198-199.) Agent Russell testified that on that occasion, he gave Raddatz $10 to use in gathering information. (Tr. 162.) Agent McCulloch testified that Raddatz gave him information about someone he knew who was selling guns and he and Raddatz went to the area of the city where Raddatz told him this person could be found. (Tr. 199-200, 229.)

According to Agent Russell, it was then, January 12, that the decision was first made to prosecute Raddatz for a firearms violation. (Tr. 168-169.) It was at the same time, according to Agent McCulloch, that Raddatz was first solicited to work for the agents as an informant. (Tr. 199-200, 248.)

While Agent Russell denied talking to Raddatz about providing assistance to the agents beyond giving them information about his gun, Agent McCulloch testified that on January 12, he and Agent Russell talked to Raddatz "about wanting to talk to these other individuals from whom he obtained the firearms and any other firearms that we may be interested in." (Tr. 199.) Agent Russell testified that he was aware of no discussions with Raddatz about the possibility that he might become an informant for the Bureau of Alcohol, Tobacco and Firearms. (Tr. 184-185.) Agent McCulloch testified that such a discussion took place on January 12. (Tr. 199.) Indeed, Agent McCulloch implied that such a discussion took place at the November 19 interview:

> Q. Did you tell Mr. Raddatz, on November 19, that you would appreciate his cooperation in showing you where he got the firearms with which he was arrested?

A. Yes, I believe we did.

Q. So Agent Russell told Mr. Raddatz that the government would consider his help in locating the origins of the firearm if he got his cooperation?

A. I don't know if he stated it that way, but we did ask his cooperation and obtained [in obtaining?] information regarding the firearm.

Q. And he did give you information regarding that firearm, did he not?

A. Yes, he did, on the 12th of January.

Q. Was that cooperation made known to the United States Attorney before the indictment? [Objection interposed.] That piece of cooperation, or that fact of cooperation, was that made known to the United States Attorney?

A. That was not the type of cooperation that we had been speaking to Mr. Raddatz about.

Q. What type of cooperation were you speaking to Mr. Raddatz about?

A. We talked to Mr. Raddatz concerning becoming an informant. (Tr. 236-237.)

Moreover, Agent McCulloch testified that on January 14, 1977, Raddatz brought his former wife to the agents' office and requested that the agents (Agent McCulloch and his supervisor, Agent Hart, were present) explain to her that the agents were seeking his cooperation. Agent McCulloch testified that "Agent Hart explained the situation to her that we were seeking his cooperation" and they discussed "the fact that we would reimburse him for travel and expenses and if he made a case there would be more money involved." (Tr. 248.) Agent McCulloch testified that on January 14, Agent Hart told Raddatz that he was going to be indicted. He stated that he believed Raddatz was aware of this before he came in on January 14. (Tr. 222, 241-242.) According to Agent McCulloch, on this occasion Raddatz repeated his January 12 statement, was given additional cash (this time $50) and was given instructions on introducing the agents to gun dealers. (Tr. 203, 207-208, 224, 228-229, 237, 248.)

2. The Magistrate's Report

The magistrate's report does not mention any conflicts in the agents' testimony. The Government's Proposed Findings of Fact, which the magistrate recommended be adopted and which were adopted by the district court as its findings, do not allude to them. Neither discusses Raddatz' contentions or his testimony. In fact, the issues of what if anything the agents told Raddatz about his legal jeopardy; why they told him they were seeking information about the prior ownership of the gun; what if any discussions were had about Raddatz becoming an informant; when any such discussions occurred; and what expectations Raddatz had when he made his statement on January 12, are never adverted to by the magistrate or in the Government's Proposed Findings. The undisputed cash payments are not mentioned. The magistrate nowhere discusses demeanor. Rather, his brief report states, without explanation of his reasoning, "I find the testimony of the Alcohol, Tobacco and Firearms agent [sic] more credible, with reference to other matters raised by defendant; I find that the Federal agents never advised Raddatz that charges against him would be dismissed, if he cooperated." (Pet. App. 41a.)

3. The District Court's Decision

The district court, in a brief memorandum order, denied the motion to suppress, stating its reasons as follows:

> [H]aving read the transcript of the hearing on the motion to suppress, the proposed findings of fact, conclusions of law, and memoranda in support thereof as submitted by both sides, the report and recommendation of the magistrate, and after hearing the arguments of the parties, the court hereby accepts the recommendation of the magistrate and adopts the Government's Proposed Findings of Fact as the court's findings. The court further finds that the three statements given by the defendant and sought to be suppressed were made voluntarily.

(Pet. App. 34a.)

SUMMARY OF ARGUMENT

1. This case should be decided on statutory grounds. Section 636 (b) of the Federal Magistrates Act ("the Act"), under which the magistrate reference in this case was made, required the district judge to "make a de novo determination of those portions of the [magistrate's] report or specified proposed findings or recommendations to which objection [was] made." 28 U.S.C. §636 (b) (1) (C).

The term "de novo" has an accepted and well-understood meaning. It requires fresh and independent consideration of the issues. *See Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1, 23 (1974). Often de novo review can be accomplished by review of a record, but where the testimony of witnesses is conflicting and credibility is crucial, a de novo decisionmaker must hear the witnesses testify so that he can observe their demeanor and assess their credibility. *See, e.g., Weahkee v. Perry*, 587 F.2d 1256, 1267 (D.C. Cir. 1978); *see also Agosto v. INS*, 436 U.S. 748, 756-757 (1978).

The legislative history of §636 (b) (1) (C) indicates that Congress was fully aware that as a consequence of requiring the district judge to make a de novo determination of contested issues, the district judge in some cases would have to hear the witnesses himself. *See* H.R. Rep. No. 94-1609, 94th Cong. 2d Sess. 3 (1976).

2. The question of due process arises in this case only if the Magistrates Act is interpreted to authorize a district judge to make a de novo determination of credibility issues without seeing and hearing the witnesses testify. The testimony in this case was conflicting, and, as the court of appeals pointed out, the transcript of the hearing before the magistrate provided no basis for a meaningful assessment of credibility. (Pet. App. 18a). In these circumstances, a vast body of precedent dictates that a reliable determination of the issues cannot be made by a decisionmaker who has not observed the witnesses' demeanor in testifying. *See e.g., United States v. Oregon Medical Society*, 343 U.S. 326, 339 (1952).

In light of the factors this Court has developed to determine what process is constitutionally required in administrative proceedings, it is manifest that the district judge was constitutionally required to hear the witnesses in this case. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *First*, respondent's individual interest – his Fifth Amendment right against self-incrimination – is a compelling one. Moreover, in this case, as in many, resolution of the motion to suppress determined the outcome of the case. *See Gannett Co., Inc. v. DePasquale*, ___ U.S. ___, 99 S. Ct. 2898, 2914 n. 1 (Powell, J., concurring). *Second*, there is a substantial risk of an erroneous depri-

vation of this interest; a district judge cannot accurately determine credibility issues of the nature of those raised by respondent's motion to suppress without considering the witnesses' demeanor. *Third*, no significant interest of the Government is impaired by a requirement that the district judge hear witnesses whose credibility is critical to the determination of a motion to suppress. This requirement will not result in the exclusion of properly obtained evidence, nor will it make more difficult for the Government to prevail in a proper case. In addition, only minimal savings in judicial resources would result if district judges were permitted to decline to rehear witnesses in cases like this one.

3. If §636 (b) (1) (C) of the Magistrates Act is construed according to its terms to require an independent determination of contested issues by a judge of the district court, the Act does not violate Article III of the United States Constitution. The Government has argued, however, that de novo consideration is not required by the Constitution and "that there is no Article III impediment to the creation of an Article I magistrate's court to decide suppression motions." (Gov. Brief at 37.)

These arguments are incorrect. Congress may create legislative tribunals only in the exercise of its specific legislative powers. *See Palmore v. United States*, 411 U.S. 389, 407-408 (1973); *Reid v. Covert*, 354 U.S. 1, 20-21, 42, 66 (1957). Congress' Article I, §8, cl. 9, power " '[t]o constitute Tribunals inferior to the supreme Court,' plainly relates to the 'inferior Courts' provided for in Art. III, §1; it has never been relied on for establishment of any other tribunals." *Glidden v. Zdanok*, 370 U.S. 530, 543 (1962).

The Government's Article III arguments deflect attention from the significant consequences of Congress'

decision to vest jurisdiction over this case in an Article III trial court. That Congressional choice of forum entitled respondent to the constitutional attributes of that forum, specifically, a judge whose independence is protected by the provisions of Article III. *See Glidden v. Zdanok, supra* at 533-534, 536; *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15-16 (1955).

ARGUMENT

I.

THE FEDERAL MAGISTRATES ACT GAVE RADDATZ THE RIGHT TO A DE NOVO DETERMINATION OF CONTESTED ISSUES BY A JUDGE OF THE DISTRICT COURT.

Section 636 (b) (1) (A) of the Federal Magistrates Act, 28 U.S.C. §636 (b) (1) (A), authorizes district court judges to refer to a magistrate, for hearing and determination, any "pretrial matter" except eight enumerated case-dispositive motions.[7] These eight case-dispositive motions,[8] along with post-confiction petitions and "prisoner petitions challenging conditions of confinement," may also be referred to a magistrate, but the Act explicitly limits the power of the magistrate in these case-

[7]Review of the magistrate's decision on §636(b)(1)(A) matters may be sought in the district court. The magistrate's decision can be set aside if "clearly erroneous or contrary to law."

[8]The eight enumerated motions for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action.

dispositive matters to making proposed findings of fact and recommendations for disposition by the district judge. §636 (b) (1) (B). *United States v. Edwards*, 602 F.2d 458, 466-467 (1st Cir. 1979). If any party objects to any aspect of the magistrate's report or recommendation, the Act directs that "a judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." §636 (b) (1) (C). This statutory directive, under the circumstances of this case, required the district court to rehear the testimony before deciding Raddatz' motion to suppress.

A. A De Novo Determination Means An Independent Determination Unprejudiced By The Magistrate's Suggested Findings.

When Congress uses a legal term like "de novo" in a statute, courts are to presume that Congress used the term in its accepted legal sense. *Agosto v. INS*, 436 U.S. 748, 754 (1978); *Bradley v. United States*, 410 U.S. 605, 609 (1973). This rule of interpretation has particular force when Congress specifies a standard of judicial review, because in this area, Congress and the courts share a well-understood common vocabulary. *See Chandler v. Roudebush*, 425 U.S. 840, 862-863 n. 37. (1976).[9]

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[9] In *Chandler*, the Court stated that "[i]n most instances . . . where Congress intends review to be confined to the administrative record, it so indicates, either expressly or by use of a term like 'substantial evidence' . . . ." 425 U.S. at 862 n. 37. This observation is confirmed in recent amendments to the Magistrates Act which provide that magistrates may try civil cases with the consent of the parties. Appeal may be had to the court of appeals "in the same manner as an appeal from any other judgment of a district court" or, when the parties consent, to the district court. In the latter case, the Act specifies that the appeal shall be "*on the record* to a judge of the district court in the same manner as on appeal

[footnote continued]

Where Congress expressly sets forth a particular standard of review, this Court strictly enforces its application by the lower courts. In *Chandler v. Roudebush*, for example, this Court found that Congress gave federal employees the right to a de novo judicial determination of their employment discrimination claims, even though a substantial evidentiary record had been developed in prior administrative proceedings. This Court rejected the approach taken by a number of courts of appeals that a district judge could insist on a showing by the plaintiff that a trial de novo would serve some useful purpose. 425 U.S. at 859-861. The Court held that by specifying review de novo, Congress denied the district court discretion to consider the case in any other manner. 425 U.S. at 861-862 and n. 37.

The term "de novo" has a common and accepted legal meaning. *See Local 777, Democratic Union Organizing Committee v. NLRB*, 603 F.2d 862, 892 (D.C. Cir. 1979) (on petition for rehearing). As federal courts have repeatedly held, the essence of de novo review is an independent determination of the issues, without deference to any prior resolutions of the issues. Thus, in *Renegotiation Board v. Bannercraft Clothing Co., Inc.*, 415 U.S. 1 (1974), the Court observed that such a proceeding would be "unfettered by any prejudice from the agency proceeding and free from any claim that the Board's determination is supported by substantial evidence." 415 U.S. at 23. *Accord, Goodman v. United States*, 518 F.2d 505, 509 (5th Cir. 1975) ("The phrase 'de novo' means 'the court should make an independent

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from a judgment of the district court to a court of appeals." Federal Magistrate Act of 1979, Pub. L. No. 96-82, 93 Stat. 643, §636 (c) (3) and (c) (4), *amending* 28 U.S.C. §636 (c). (Emphasis added.)

determination of the issues.' "); *Service Arms Co., Inc. v. United States*, 463 F. Supp. 21, 23 (W.D. Okla. 1978) ("[T]he administrative decision is not entitled to any presumption of correctness or other advantage."). Indeed, the Government does not contend otherwise. It agrees that the statutory requirement of a de novo determination by the judge precludes the judge from deferring to the magistrate's assessment of the testimony. (Gov. Brief at 43.)

Thus, by using the term "de novo," the Act directs the district court to make its own independent determination of the issues. The Government argues that there is some significance in the Act's use of the term "de novo determination" rather than "de novo hearing." (Gov. Brief at 22.) The interchangeable use of these terms in the decisional law demonstrates, however, that this is a distinction without a difference. *See, e.g., Agosto v. INS, supra,* 436 U.S. at 751, 753 (1978). This Court has so held. In *United States v. First City National Bank,* 386 U.S. 361 (1967), where the relevant statute provided that "the court shall review de novo the issues presented," this Court squarely rejected the argument that "the use of the word 'review' rather than 'trial' indicates a more limited scope to judicial action":

> The critical words seem to us to be "de novo" and "issues presented." They mean to us that the court should make an independent determination of the issues.

386 U.S. at 368.

The Government's argument that the term "de novo determination" does not necessarily require a rehearing of evidence (Gov. Brief at 23) is thus correct, but it is inconsequential. The issue before the Court is not whether a district court must invariably rehear the evi-

dence in making a de novo determination under §636 (b)(1)(C). Rather, the issue is whether the district court had to hold an evidentiary hearing to make a de novo determnation in this case because it had to make credibility choices from the conflicting testimony of the witnesses. The court of appeals held that in this case, where an assessment of the credibility of witnesses was critical to the determination of a motion to suppress, due process required the judge to rehear the witnesses. That decision, based on constitutional grounds, is fully sustainable as a matter of statutory construction.

The courts have repeatedly held that when a statute requires a judge to make a de novo determination and credibility is crucial, he may adequately consider demeanor evidence only by observing the witnesses testify. In *Pignatello v. Attorney General of the United States,* 350 F.2d 719 (2d Cir. 1965), the issue before the court of appeals was whether it could make a de novo determination of citizenship based on the record of an INS hearing, or whether it had to remand the case to the district court for the taking of evidence. Noting that the petitioner was entitled to "a de novo judicial determination of the claim, not judicial review of the administrative disposition of that claim," 350 F.2d at 723, and that the case presented "delicate issues of credibility that could only be resolved with the benefit of live testimony," the court of appeals remanded the case to the district court for an evidentiary hearing. *Id.*

In *Hackley v. Roudebush,* 520 F.2d 108 (D.C. Cir. 1975), a Title VII case, the court rejected the argument that a de novo hearing is a wasteful duplication of prior agency proceedings. 520 F.2d 149-155. The court concluded that live testimony must be considered when "credibility is an integral component of a material factual conflict." 520 F.2d at 159.

Weahkee v. Perry, 587 F.2d 1256 (D.C. Cir. 1978), another Title VII case, involved an appeal from a district court's entry of summary judgment based on evidence in the administrative record, including an investigator's report. The court of appeals reversed, stating:

> [T]he [district] court may not abdicate its responsibility and accord the investigator's report controlling weight simply because it finds substantial evidence to support the investigative determination. Such a view works at cross purposes with Congress' intention that the courts conduct *de novo* proceedings in cases of employment discrimination.
>
> . . . . [U]nder *de novo* review mandated by Congress it is the court's judgment and not the administrator's that is controlling. The court must carefully review the record and make its own independent judgment of the issues as it does in any civil matter tried to the court.

587 F.2d at 1265. The court further held that because motivation, intent, and credibility were highly relevant, the district court would have to consider demeanor, and thus was required to rehear the evidence:

> A *de novo* proceeding is necessary in all Title VII cases. In some cases, the administrative record will be so full and clear andthe issues such that a *de novo* review of the record will be all that is required and summary judgment will be available; but when as in this case the material facts are in dispute and issues of credibility are involved, the court will require additional testimony to supplement the administrative record.

587 F.2d at 1267.

The same result is required here.

B. The Requirement Of A De Novo Determination Of Contested Issues Was Included By Congress With Full Awareness That It Would Necessitate Rehearing In Some Cases.

The Government takes the position that although the Act requires the district judge to make a de novo determination of contested issues, he need never rehear the witnesses, even if the disposition of the motion depends wholly on the evaluation of conflicting testimony. (Gov. Brief at 24.) The Government relies on statements from the legislative history to support this contention. If the legislative history and the judicial decisions which influenced the adoption of the 1976 amendments are more closely examined, however, it becomes apparent that Congress was fully aware that rehearings might be necessary in cases where credibility was crucial, and for that reason, specifically provided for the hearing of witnesses by the district court.

In *Wingo v. Wedding*, 418 U.S. 461 (1974), this Court held as a matter of statutory construction that the Magistrates Act, as enacted in 1968, did not authorize magistrates to hold evidentiary hearings in habeas corpus cases.[10] The Court held, in addition, that the lack of authority was not cured by a local rule requiring that the district judge listen to a tape recording of the hearing and "give it de novo consideration." Listening to a tape recording, the Court observed, is not " 'the equivalent of the judge's own exercise of the function of the trier of the facts.' " 418 U.S. at 467, 474-475, quoting *Holiday v. Johnston*, 313 U.S. 342, 352 (1941).

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[10]Prior to this Court's decision in *Wingo v. Wedding*, two courts of appeals had held that magistrates could hold evidentiary hearings in post-conviction cases, subject to rehearing before an Article III judge if disputed issues of fact developed. *Noorlander v. Ciccone*, 489 F.2d 642, 648 (8th Cir. 1973); *O'Shea v. United States*, 491 F.2d 774, 778 (1st Circ. 1974).

Chief Justice Burger, dissenting, disagreed with the Court's construction of the relevant statutes. He too expressed concern about the judge's ability to assess credibility but concluded that as long as the judge retained the power to hear the witnesses himself, no constitutional problem need be encountered:

> Not only would [the magistrate's] report and recommendation to the district judge be subject to amendment or outright rejection, the district judge could, at the behest of the habeas corpus petitioner or on his own motion, conduct his own evidentiary hearing to judge for himself, for example, the credibility of witnesses if he deems their testimony essential to disposition of the application. To the extent a problem of constitutional magnitude may be foreseen in the particulars of the rules established by a district court, those rules can be construed to comport with constitutional requirements.

418 U.S. at. 487.

The 1976 amendments were proposed by the Judicial Conference in response to the statutory holding in *Wingo v. Wedding. See Jurisdiction of United States Magistrates: Hearings on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 1 (1975). But the design of the amendments was influenced as well by the decision of the Ninth Circuit Court of Appeals in *Campbell v. United States District Court*, 501 F.2d 196 (9th Cir.), *cert. denied*, 419 U.S. 879 (1974). *See* H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3 (1976). That decision established a reference procedure which, in keeping with the accepted meaning of de novo, required the judge to make an independent determination of facts and law and authorized him to rehear evidence where necessary to permit him to make a de novo determination of contested issues.

Campbell came to the Ninth Circuit on a petition for a writ of mandamus to prevent the reference of a Fourth Amendment motion to suppress to a magistrate. The reference had been made pursuant to a local rule promulgated under §636 (b), which then provided hat magistrates could be assigned "such additional duties as are not inconsistent with the Constitution and laws of the United States." The rule did not set forth any standard for review. The referring judge had told the parties that in reviewing a magistrate's report, his "philosophy" was to accept the magistrate's rulings on facts. 501 F.2d at 200.

The Ninth Circuit upheld the reference but expressed its disagreement with the procedure contemplated by the trial judge. Quoting extensively from *TPO, Inc. v. McMillen*, 460 F.2d 348 (7th Cir. 1972), the court held that while the magistrate may preside at an evidentiary hearing, "he may not himself decide the motion." 501 F.2d at 206. Hence, the district court "was in error in stating it must accept the findings of the magistrate. The district court has the duty to make the final decision on the facts." 501 F.2d at 207.

Because of the procedural posture of the *Campbell* case, no evidence had been taken and the issue of the scope of review was not concretely presented. Nevertheless, while declining "to discuss the local rules in detail," 501 F.2d at 207, the court set forth guidelines to govern the district judge's review. It held first that "[a] magistrate may not, in a hearing on a motion to suppress, exercise ultimate decision-making power." 501 F.2d at 205. Second, it directed that when a party contests the magistrate's proposed findings of fact, "[t]he court shall make a *de novo* determination of the facts." 501 F.2d at 206.

The court also discussed the procedure on review. The district court would be required to listen to a tape recording of the hearing. It would be empowered to hear evidence if "it finds there is a problem as to the credibility of a witness or witnesses or for other good reasons . . . ."[11] The court left to the judge's discretion the issue of whether he need hear evidence, but it noted that the procedure it announced would solve "the problem of the credibility of witnesses based on observations discussed in *Wingo v. Wedding.*" 501 F.2d at 202, 205-207.[12]

The legislative history of the 1976 amendments makes clear that, in conformity with *Campbell,* Congress did not intend to authorize magistrates to exercise adjudicatory authority with respect to §636 (b) (1) (B) matters. Representative Danielson, speaking on the floor of the House on October 1, 1976, stated:

> It is not intended that a magistrate shall have the power under subparagraph (A) "to hear and determine" such dispositive motions. However, it is intended that under subparagraph (B) a judge of the

[11]Language from *Campbell,* including this discussion of witness credibility, was quoted in the House Report. H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3 (1976).

[12]*Campbell* might be read to imply that the district court's discretion is unreviewable. This reading would contradict established principles of federal appellate jurisdiction. *See, e.g., Brown v. Thompson,* 430 F.2d 1214, 1215-1216 (5th Cir. 1970); *see generally LaBuy v. Howes Leather Co.,* 352 U.S. 249, 259-260 (1957). In *United States v. Belculfine,* 508 F.2d 58 (1st Cir. 1974), the court of appeals discussed *Campbell* with approval, but remanded the case before it with instructions for a hearing before the district judge, noting that "the credibility of witnesses is so likely to be determinative, and the evidence so delicately balanced that we see little probability that judicial time would be saved by preliminary reference to a magistrate." 508 F.2d at 64.

> court, in his discretion, may assign such dispositive motions to a magistrate for hearing and recommendation to a judge of the court for ultimate disposition.

122 Cong. Rec. 35181 (1976).

The House Report on the bill explained:

> . . . [S]uch motions, which may be heard by the magistrate, will be determined by the judge, and those portions of findings and recommendations to which objection is made will require a *de novo* determination by the judge.

H.R. Rep. No. 94-1609, 94th Cong., 2d Sess. 3 (1976).

The House Report explained the reason for the inclusion of an express requirement of de novo review in terms wholly consistent with the accepted meaning of de novo:

> The second amendment emphasizes and clarifies when a de novo determination must be made by the judge. The Committee believed that the S. 1283 was not clear with regard to the type of review afforded a party who takes exceptions to a magistrate's findings and recommendation in dispositive and posttrial matters . . . . The amendment states expressly what the Senate implied: i.e. that the district judge in making the ultimate determination of the matter, would have to give fresh consideration to those issues to which specific objection has been made by a party.

Id.

The legislative history also demonstrates that Congress was clearly advised that if it required de novo review, rehearings would at times be necessary. The Judicial Conference, in explanatory material accompanying its pro-

posed amendment, explained that the inclusion of a de novo review provision would require the judge "to conduct an inquiry into the specific allegations of error in the same manner as if he were hearing the matter initially." *See Jurisdiction of United States Magistrates: Hearing on S. 1283 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 37 (1975). The Judicial Conference advised that while "proposed section (b) (1) may well generate some duplication of effort in a particular case," it should be adopted. *Id.* It predicted that if magistrates were carefully selected and the bench and bar gained confidence in them, objections would be asserted infrequently. The Conference urged that de novo review be required, whatever the cost in duplication, in order to avoid any potential Article III problems implicit in the delegation of adjudicative power over case-dispositive matters to non-Article III personnel. *Id.* at 35.

The Government correctly asserts that the House Report states that "[t]he use of the words 'de novo determination' is not intended to require the judge to actually hold a new hearing" in the normal case. (Gov. Brief at 26.) But the Government fails to report that the House Report also states, "In some specific instances, however, it may be necessary for the judge to . . . recall witnesses . . ." H.R. Rep. No. 94-1609, *supra* at 3. The Government similarly omits important qualifying language in attempting to demonstrate "Congress' clear understanding" that the words de novo determination do not require the judge to conduct a new hearing. (Gov. Brief at 28.) It quotes material from the Judicial Conference's advisory "Jurisdictional Checklist – Duties Which May be Assigned to United States Magistrates," which was an exhibit to a witness' testimony in 1977 hearings, but omits this language:

> In some specific instances it may be necessary for the judge to modify or reject the findings of the magistrate, to take additional evidence, recall witnesses, or recommit the matter to the magistrate for further proceedings. If, for example, the judge finds that there is a problem as to the credibility of a witness or witnesses in an adversary proceeding. [sic]

Magistrate Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 95th Cong., 1st Sess. 37 (1977). *See also* House Report 94-1609, *supra* at 11 ("The bill would permit the court by local rules . . . to specify any procedure for bringing the matter on for a formal hearing, if a formal hearing is to be required.")[13]

This legislative history thus demonstrates, first, that Congress was aware, when it adopted the requirement of a de novo determination, that rehearing of evidence by the court would at times be necessary, especially in cases involving crucial issues of credibility, and second, that it did not intend to restrict the court to record review in such cases.

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[13]The Government contends that if the requirement of a de novo determination itself mandates a rehearing, the provision in the Act giving the judge the power to recall witnesses is surplusage. (Gov. Brief at 23.) For the reasons explained at page 24, *supra*, a de novo determination does not invariably require a new hearing but does so only to the extent that credibility or some other source of material evidence not included in the record is crucial. The reservation of power in the judge to hear live testimony is, rather than surplusage, proof that Congress anticipated that the judge would in some cases have to hear the witnesses himself to make a de novo determination.

C. The Cases Cited by the Government Do Not Support its Argument That Congress Intended to Authorize District Judges to Make Credibility Determinations on the Basis of Review of a Cold Record.

The Government has cited *United States v. Lieberman*, No. 78-1465 (1st Cir. Nov. 7, 1979); *Muhich v. Allen*, 603 F.2d 1247 (7th Cir. 1979); *Orand v. United States*, 602 F.2d 207 (9th Cir. 1979); and *United States v. Whitmire*, 595 F.2d 1303 (5th Cir. 1979), in support of its argument that the de novo determination directive of the Act does not require a new hearing. Respondent, as stated previously, does not contend that in the generality of cases, a de novo determination does require a new hearing. In the circumstances of this case, however, because of the conflicting testimony and the crucial importance of credibility choices in the resolution of the contested issues, a new hearing was necessary. With the possible exception of *United States v. Whitmire*, the cases cited by the Government do not hold to the contrary.

In *Lieberman*, the First Circuit expressly distinguished the Seventh Circuit's decision in the instant case. Recognizing that contested issues of witness credibility could alter the procedure necessary for adequate de novo review, the *Lieberman* court approved record review in the case before it because "[h]ere the magistrate made no such critical credibility judgments." Slip op. at 22 n. 25.[14]

Muhich involved a civil jury trial conducted by a magistrate with the consent of the parties. The jury, not the magistrate, made the determinations of witness credi-

[14]Moreover, the appellant in *Lieberman* "did not object to the initial reference to a magistrate or request an evidentiary hearing before the district judge." Slip op. at 22 n. 25.

bility, as was essential given the parties' Seventh Amendment right to a jury trial.[15] Moreover, the court held that because the parties consented to the reference and failed to file objections to the magistrate's recommendations, they had "voluntarily and knowingly agreed to waive their right to a civil trial before an Article III judge." 603 F.2d at 1251.[16]

No does *Orand* address the issue presented here. *Orand* held that the district judge failed to comply both with the de novo determination requirements of *Campbell*, from which the opinion quotes extensively, 602 F.2d at 208, and with the Magistrates Act.[17] The Ninth Circuit,

[15]In Muhich, the magistrate, besides recommending that judgment be entered on the jury's verdict, also recommended that some defendants' motions for a directed verdict be granted. In ruling on a motion for a directed verdict, the court may not make credibility choices where the testimony is in conflict. *See* 9 C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2527 (1971).

[16]In *Hill v. Jenkins*, 603 F.2d 1256 (7th Cir. 1979), argued on the same day as *Muhich*, the Seventh Circuit held that consent of the parties is essential to the reference of any civil trial to a magistrate. The court of appeals reversed the district court's adoption of the magistrate's recommendations because the parties had not consented to the reference and because the district court had failed to conduct a de novo review of proceedings held before the magistrate, as required by the Act. 603 F.2d at 1258.

[17]*Orand* is an example of an apparently not uncommon misuse of the Magistrates Act by district judges. The Ninth Circuit noted the conditions under which the district court had made its purportedly de novo review:

> There were no tape recordings of the evidence and proceedings before the magistrate. The stenographic notes from the magistrate's hearing were not fully transcribed until November 18, 1977, three months after the district court adopted the magistrate's report and recommendation. 602 F.2d at 209.

Hill v. Jenkins, supra, is an even more extreme example of a district court's failure to follow the congressionally mandated standard of review:

[footnote continued]

in connection with its remand instructions, cited the Seventh Circuit's *Raddatz* opinion and its own opinion in *United States v. Bergera*, 512 F.2d 391 (9th Cir. 1975), obviously directing the district court to give consideration to whether it should rehear witnesses on remand. 602 F.2d at 209 n. 5.[18]

In *Whitmire*, the Fifth Circuit did express its disagreement with the decision of the court of appeals in this

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[T]he district court adopted *verbatim* the findings of fact and conclusions of law submitted to him by the appellees, and proceeded to enter an order granting judgment in favor of the appellees. In reaching this determination, the district judge did not have before him any findings or conclusions submitted by the appellant. Nor did the district court have the benefit of the magistrate's findings and recommendations for disposition of the case, as required by Section 636 (b) (1) (C) of the Act, since the magistrate never filed a report on the proceedings with the district court. Consequently, neither party had an opportunity to file objections, if any, to the magistrate's report. Indeed, the district judge did not even have before him the transcript of the hearing, since it was not prepared by the court reporter until after this appeal had been filed. 603 F.2d at 1258–1259.

This problem has not gone unobserved. *See Magistrates Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 160 (1977) (remarks of Hon. Griffin B. Bell).

[18]In *United States v. Bergera*, 512 F.2 391 (9th Cir. 1975), a magistrate recommended that a motion to suppress be granted, but the district judge, exercising an authority ostensibly consistent with the *Campbell* decision, *supra* at pp. 28-30, rejected the recommendation. The Ninth Circuit reversed, holding that unless the district judge hears the evidence himself, the magistrate's recommendations must be adopted. 512 F.2d at 394. *Bergera*, to this extent, is inconsistent with the 1976 amendments which make clear that the judge is not bound by the magistrate's recommendation, that he must make a de novo determination of contested issues and that he is free to accept, reject or modify the magistrate's recommendation, whether or not he rehears the evidence. 28 U.S.C. §636 (b) (1) (C). See p. 52 n. 28, *infra*.

case. 595 F.2d at 1305 n. 1. It does not appear from the court's extensive review of the evidence at the suppression hearing, however, that credibility issues were critical to the disposition of the motion.[19]

Where all the evidence that was before the magistrate is accessible to the judge, the judge can evaluate the quality of the magistrate's report in a menainingful way and make an independent determination of contested issues. *See Mathews v. Weber*, 423 U.S. 261, 274 (1976). But where credibility is critical, a judge who has not observed the witnesses testify must make his decision without knowledge of the witnesses or their demeanor, in cases like this one perhaps the most probative source of evidence available. Neither the legislative history nor the authorities relied on by the Government indicate that Congress intended to authorize this kind of arbitrary and unreliable decisionmaking in important, case-dispositive matters.

II.

IN DECIDING RESPONDENT'S MOTION TO SUPPRESS AN INVOLUNTARY STATEMENT, THE DISTRICT JUDGE COULD NOT MAKE AN INDEPENDENT ASSESSMENT OF THE WITNESSES' CREDIBILITY, IN A MANNER CONSISTENT WITH DUE PROCESS, WITHOUT HEARING THEM TESTIFY.

This case should be resolved on statutory grounds for the reasons set forth in Section I above. The Magistrates

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[19]The Court should be aware of a recent case not cited by the Government in which the Eighth Circuit upheld an order of a district court directing enforcement of an IRS summons based on the recommendations of a magistrate. *United States v. Miller*, No. 79-1226 (8th Cir. Oct. 30, 1979). The court rejected the contention that §636 (b) (1) (B) requires the judge to hold "a full hearing *de novo*." Slip. op. at 8-9. The court noted, however, that neither the Government nor Miller presented oral testimony before the

[footnote continued]

Act directs that a "de novo determination" be made of each contested finding of a magistrate; the "de novo" standard requires an independent assessment of the facts; and the district judge in this case could not make such an assessment without hearing the witnesses. The Government concedes that the Act requires a district judge to make an independent decision and that he cannot do so by deferring to a magistrate's evaluation of testimony. (Gov. Brief at 43.)[20] Yet the Government contends that an independent decision can be made by what it terms a "thorough" review of the record. (Gov. Brief at 49.) Under this interpretation of the Act, the constitutional question arises: can a district judge who has not observed the witnesses make an independent determination of their credibility sufficiently reliable to comport with due process?

In conformity with one of the basic principles of our legal system, the court of appeals ruled below that, given the nature of the issues presented by this case, due process required the decisionmaker to hear the witnesses. This conclusion is fully supported both by decisions involving judicial proceedings and by the factors outlined by this Court in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), for determining what process is due in non-judicial proceedings.

The Government defends the manner in which the district court decided Raddatz' motion in two ways. First, it asserts that Raddatz' testimony at the suppression hearing before the magistrate was so inherently incredible that demeanor evidence was unimportant. (*See* Gov. Brief at 42 n. 28, 54-55.) However, as the court of appeals expressly found, based on its own review of the record, Raddatz' testimony was not inherently incredible, and the testimony of the Government agents was seriously in conflict. (Pet. App. 5a-7a, 18a.)

Second, the Government contends that even if demeanor evidence is critical, the procedures employed here would satisfy due process. The magistrate, the Government points out, sees the witnesses and proposes factfindings. As long as the district court comes to the same conclusions based on record review, then contends the Government, the losing party has had two substantial opportunities to prove his case and no basis for complaint. (Gov. Brief at 43-44, 49-50.) Only if the record review results in a disagreement with the magistrate does the Government allow that rehearing may be necessary. (Gov. Brief at 53-54.) The fault in the Government's argument is that, where demeanor evidence may be dispositive, record review does not allow an accurate evaluation of credibility. The district judge in this case had no basis for a decision to agree or disagree with the magistrate.

If the issue of due process need be reached, the decision of the court of appeals on this issue is manifestly correct.

A. The Record Does Not Demonstrate That Respondent Was Untruthful.

The Government argues that the testimony of the federal agents was "inherently more credible" than Raddatz' testimony and hence, the district judge was entitled to resolve the conflicts in the testimony of the witnesses against Raddatz without considering demeanor.

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magistrate (Miller "reiterated the objections made in his answer") and Miller declined the opportunity to question the Government agent. Slip. op. at 3. Thus the case involved no issue of witness credibility.

[20] Article III of the United States Constitution also requires that the determination of a motion to suppress a confession be made independently by the district court. See pp. 60-66, *infra*.

(Gov. Brief at 54-55.) In support of this assertion, the Government relies on Raddatz' prior criminal record, Raddatz' admission that he once gave untruthful information to two federal agents and the "consistent and corroborating" testimony of these agents.[21] The court of appeals concluded, to the contrary, that demeanor was indispensable to a determination of the issues in this case.

The fact that an individual has a criminal record cannot create a presumption that he will not testify truthfully under oath. Since the judge has a readily available means of deciding accurately whether a defendant is credible by considering his demeanor, presumption would be irrational and violative of due process. *See Cleveland Board of Education v. LaFleur,* 414 U.S. 632, 644-645 (1974): *Stanley v. Illinois,* 405 U.S. 645, 656-657 (1972).

Raddatz' testimony was straightforward. He testified consistently as to what he did, and why he did it. He testified that the information he first gave to the agents

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[21]The Government asserts that *three* law enforcement officers gave "consistent and corroborating" testimony. (Gov. Brief at 55.) The testimony of Officer Vollick, one of the three, dealt only with Raddatz' arrest on August 8, 1976. Officer Vollick was not present at the interviews on November 19 and January 12, which were at issue in the suppression hearing, and the federal agents were not present on August 8.

With respect to the August 8 arrest, the Government argues that Raddatz' testimony was "implausible." (Gov. Brief at 55.) It was not. The testimony of Officer Vollick, who alone contradicted Raddatz, was, at best, confused. Indeed, the confusion in his testimony forced the Government to posit alternative theories of what occurred in its proposed findings of fact. (App. 6, finding "d.") While the Government asserts that Vollick's testimony was corroborated by the police report (Gov. Brief at 43 n. 28), the police report was never admitted into evidence, its contents were never disclosed, and the author of the report, Officer Bach, was never called as a witness. (Tr. 14.)

was untrue but that the information he subsequently provided was truthful. (Tr. 110-111, 133.) The Government has never contended otherwise. He never equivocated about the promise he had received from the agents that the forthcoming federal indictment would be dismissed in exchange for his cooperation.

By contrast, the testimony of the agents, as the court of appeals observed, was not forthright and consistent. (*See* Pet. App. 6a-7a.) The substance of their testimony was in conflict on a number of critical issues, including the following:

1. Agent Russell denied that Raddatz himself was an object of investigation on November 19. (Tr. 175-176, 177-178, 183-184.) Russell testified that his interest shifted from an investigation of the gun to an investigation of Raddatz for purposes of a federal prosecution only after Raddatz' statement of January 12. (Tr. 168-169.)

Agent McCulloch testified, however, that the agents' purpose in interviewing Raddatz on November 19 was to obtain an admission for use in a §922 (h) prosecution against him. (Tr. 215-216.)[22]

2. Agent Russell denied that he told Raddatz on November 19 that he might be indicted, stating, "I had no case." (Tr. 183-184.) Agent McCulloch testified, however, that Agent Russell himself told Raddatz, on November 19, that Raddatz had violated federal law when he was arrested on August 8. (Tr. 217-218.) Although Agent McCulloch could not recall whether Agent

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[22]McCulloch's account was corroborated by the agents' conduct between November 19 and January 12, when they collected documentary evidence supporting a §922 (h) indictment. (Tr. 217.)

Russell explicitly told Raddatz he would be indicted, Agent McCulloch believed Raddatz must have known this prior to January 14. (Tr. 218-219, 241-242.)

3. Agent Russell, on the Government's direct examination, testified that he had never discussed cooperation with Raddatz:

> Q. During that period [November 19 through January 12] did you have any discussion with Herman Raddatz with regard to his possible cooperation with the Government?
>
> A. Relative to this case?
>
> Q. Yes.
>
> A. No.
>
> Q. Relative to any case?
>
> A. No, sir. (Tr. 161.)

On cross-examination, however, his testimony changed:

> Q. So there had been some discussion between you and Mr. Raddatz on November 19 about his possibly cooperating one way or another with ATF?
>
> A. Only to the location – my conversation with him was to the location of Batson.
>
> Q. Right. What reason did you give him for which he might want to cooperate with you?
>
> A. I would mention it to the United States Attorney, that he had assisted us in the case, in the event the case developed at that time. It was still in the investigative stages. (Tr. 165.)

4. As noted above, Agent Russell testified that the only cooperation the agents requested of Raddatz on

November 19 was assistance in tracing the origin of the gun with which he had been arrested and that any cooperation Raddatz provided would be brought to the attention of the United States Attorney. Agent McCulloch provided a different version:

> Q. So Agent Russell told Mr. Raddatz that the government would consider his help in locating the origins of the firearm if he got his cooperation?
>
> A. I don't know if he stated it that way, but we did ask his cooperation and obtained information regarding the firearm.
>
> Q. And he did give you information regarding that firearm, did he not?
>
> A. Yes, he did, on the 12th of January.
>
> Q. Was that cooperation made known to the United States Attorney before the indictment? [Objection interposed.] That piece of cooperation, or that fact of cooperation, was that made known to the United States Attorney?
>
> A. That was not the type of cooperation that we had been speaking to Mr. Raddatz about.
>
> Q. What type of cooperation were you speaking to Mr. Raddatz about?
>
> A. We talked to Mr. Raddatz concerning becoming an informant. (Tr. 236-237.)

In sum, the testimony of the two agents did not provide a coherent account of why they first interviewed Raddatz, what they said to him on that occasion, and why he came to see them in January with the only information they needed to indict and convict him. If the record objectively establishes anything, it is that the

agents' testimony was not "consistent and corroborating," and that the court of appeals was correct: "[T]he truth cannot be derived from this written record without an intolerably high margin of error . . . ." (Pet. App. 18a.)

B. Record Review Of The Hearing Before The Magistrate Provided The District Court With No Basis For Determining Credibility Adequate To Meet The Requirements Of Due Process.

1. An unbroken tradition of decisions involving judicial proceedings directs that the trier of fact must observe the witnesses in order to assess their credibility accurately.

In *Rouse v. United States*, 359 F.2d 1014 (D.C. Cir. 1966), a suppression motion was decided in a manner analogous to the decision in the present case. The motion was initially presented to a motions judge before trial; in the pretrial hearing serious conflicts in testimony developed. The motions judge declined to suppress the evidence, but he indicated that the defendants should have a right to renew their motion at trial. However, when the motion was presented to the trial judge, he denied it on the basis of a review of the transcript of the hearing, without rehearing any evidence. The court of appeals reversed. In his concurring opinion, Judge McGowan stressed that the trial judge could not effectively determine credibility from the written record:

> To resolve properly an issue of credibility of the kind involved in this case, the judge who finally decides the suppression question must see and hear the clashing witnesses.

359 F.2d at 1017.

That is the principle which the court of appeals applied in the present case. Unless the ultimate decisionmaker

sees and hears the witnesses, he cannot make a reliable independent judgment of their credibility. There is no more pervasive principle in our law.

Over one hundred years ago, in *Regina v. Bertrand*, 4 Moo. P.C. (N.S.) 460, 481 (1867), Lord Coleridge stated the view of the Privy Council that a retrial should not be conducted by reading notes of the witnesses' previous testimony:

> The most careful note must often fail to convey the evidence fully in some of its most important elements . . . . It cannot give the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration; . . . it is . . . the dead body of the evidence, without its spirit; which is supplied, when given openly and orally, by the ear and eye of those who receive it.

For this reason, it has become axiomatic that federal appeals courts cannot make de novo determinations of facts found by a trial court, especially when credibility is in question. Rule 52 of the Federal Rules of Civil Procedure allows reversal of a trial court's findings of fact only when they appear "clearly erroneous," a standard explained by this Court in *United States v. Oregon Medical Society*, 343 U.S. 326, 339 (1952), quoting *Boyd v. Boyd*, 252 N.Y. 422, 429, 169 N.E. 632, 634 (1930):

> Face to face with living witnesses the original trier of fact holds a position of advantage from which appellate judges are excluded. In doubtful cases the exercise of his power of observation often proves the most accurate method of ascertaining the truth . . . . How can we say the judge is wrong? We never saw the witnesses.

See also Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123 (1969) ("[A]ppellate courts must

constantly have in mind that their function is not to decide factual issues *de novo*"); *United States v. Yellow Cab Co.*, 338 U.S. 338, 341 (1949) ("Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them.").[23]

In other contexts as well, the courts have repeatedly affirmed that the ultimate decisionmaker on issues involving credibility must observe the witnesses. When a trial judge resigns or dies, after the conclusion of trial, without filing findings and conclusions, his successor may not resolve factual disputes by reading the trial transcript, but must hold a new trial. *Brennan v. Grisso*, 198 F.2d 532 (D.C. Cir. 1952); *United States v. Nugent*, 100 F.2d 215, 217 (6th Cir. 1938) *cert. denied*, 306 U.S. 648 (1939) ("[B]y universal practice and tradition [factual] findings are based upon personal observation of the witnesses . . . . . "). *See* 7 J. Moore, *Federal Practice* §63.05 at 63-9 (1978 ed.) ("A successor judge is in no position to pass on the credibility of witnesses whom he has not seen."). Similarly, in deciding whether to impose contempt sanctions for failure to comply with court orders, a district court must hear testimony, rather than entering judgment on the basis of affidavits. *Sanders v. Monsanto Co.*, 574 F.2d 198, 200 (5th Cir. 1978).

The force and pervasiveness of the principle that the trier of fact must observe the witnesses is grounded on

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[23]The decisions of courts of appeal requiring deference to the factfindings of the trial court are legion. *See, e.g., Dowell v. United States*, 553 F.2d 1233, 1235 (10th Cir. 1977); *Palermo v. Warden, Green Haven State Prison*,545 F.2d 286, 293 (2d Cir. 1976); *United States v. Reddoch*, 467 F.2d 897, 898 (5th Cir. 1972); *Baker v. United States*, 343 F.2d 222, 224 (8th Cir. 1965); *Orient Mid-East Lines, Inc. v. Cooperative for American Relief Everywhere, Inc.*, 410 F.2d 1006, 1009 (D.C. Cir. 1969).

the conviction that the demeanor of a witness may belie his words, so that a judgment based on the words alone is likely to be wrong:

> [Demeanor] evidence may satisfy the tribunal, not only that the witness' testmony is not true, but that the truth is the opposite of his story; for the denial of one, who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating, and that, if he is, there is no alternative but to assume the truth of what he denies.

Dyer v. MacDougall, 201 F.2d 265, 269 (2d Cir. 1952) (L. Hand, J.).

> Let us imagine that every spoken word in a trial is all correctly written out, and then all read by the jury, or read to the jury or the judge. Is there anyone so foolish as to say that a wrong decision would not be more likely in the absence of living witnesses and speakers . . .[?]

J. Frank, *Courts on Trial* 21 (1949), quoting Osborne, *The Mind of the Juror* 86-98 (1937).

The point was made perhaps most succinctly in an early decision of the Illinois Supreme Court: "There is an inherent impossibility of determining with any degree of accuracy what credit is justly due to a witness merely from reading the words spoken by him . . . ." *Calvert v. Carpenter*, 96 Ill. 63, 67 (1880).

The district judge, therefore, was in no position to make any meaningful assessment of the contested facts regarding Raddatz' motion – all of which depended on conflicting testimony – without hearing the witnesses. His judgment, required to be independent, was necessarily arbitrary. It could not comport with due process, an essential function of which "is to minimize the risk of

erroneous determination." *Addington v. Texas*, ___ U.S. ___, 99 S. Ct. 1804, 1809 (1979).

2. The factors analyzed in determining what process is due in administrative proceedings also dictate that the trier of fact in a motion to suppress involuntary statements must observe the witnesses testify.

The tradition of credibility determination by one who has heard the witnesses is of such "nearly complete and longstanding acceptance"[24] that this Court has not yet had occasion to define it as an element of due process in judicial proceedings.[25] Accordingly, the Government has suggested that the due process question here be analyzed under the principles which this Court set forth in determining the extent of due process rights to hearing in certain administrative cases. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Mackey v. Montrym*, ___ U.S. ___, 99 S. Ct. 2612, 2617 (1979). These cases require a balancing of three factors: (1) the private interest affected by the governmental action sought to be reviewed; (2) the risk of erroneous deprivation of that private interest and the extent to which the risk will be reduced by the procedural safeguards proposed; and (3) the government's interest in the proceeding, including both its function and the costs of the proposed safeguard.

[24] *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

[25] Courts of appeal have made such due process rulings. *United States ex rel. Graham v. Mancusi*, 457 F.2d 463, 469 (2d Cir. 1972); *Smith v. Dental Products Co.*, 168 F.2d 516, 518–19 (7th Cir. 1948). And this Court has stressed the importance of observation of witnesses by the trier of fact in requiring production of witnesses under the Confrontation Clause of the Sixth Amendment. *Berger v. California*, 393 U.S. 314, 315 (1969). ("[O]ne of the important objects of the right of confrontation was to guarantee that the fact finder had an adequate opportunity to assess the credibility of witnesses.") Finally, three justices of this Court, discussing an issue not reached by the majority, stated that factfinding by record review, in the context of a juvenile delinquency proceeding, violated due process. *Swisher v. Brady*, 438 U.S. 204, 231 (1978) (Marshall, J. dissenting).

This model for determining administrative process may not fit precisely the workings of courts of law, where a long-established practice has come to define the process due. Indeed, administrative procedure is frequently distinguished from the more deliberate judicial process. *See, e.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142-143 (1940); 2 Davis, *Administrative Law Treatise* §11.01 (1958). However, even the factors considered by this Court in judging the constitutional adequacy of administrative process make it clear that rehearing of witnesses was required in this case.

a. **The private interest.** Raddatz' interest in the proceeding under review is his right, under the Fifth Amendment, not to be a witness against himself. He moved to suppress his statements to federal agents on the ground that the agents obtained these statements by promising him immunity from a criminal charge. That the right against self-incrimination is of fundamental importance is so well-known that little argument should be necessary. *See Ullman v. United States*, 350 U.S. 422, 426 (1956); *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964). Yet the Government attempts to belittle the right by asserting that what is involved here is merely the suppression of evidence, "concerned with deterrence of official misconduct and not with the more fundamental determination of guilt or innocence." (Gov. Brief at 45.) In so arguing, the Government confuses one issue, whether the exclusionary rule should be imposed by the courts to enforce the warrant and reasonable search requirements of the Fourth Amendment, with the very

different issue of enforcing the Fifth Amendment according to its terms.

The Fifth Amendment, in contrast to the Fourth, contains a "direct command against the admission of compelled testimony." *United States v. Janis*, 428 U.S. 433, 443 (1976). In adopting the prohibition against self-incrimination, the framers of the Bill of Rights "made a judgment and expressed it in our fundamental law, that it were better for an occasional crime to go unpunished than that the prosecution should be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused." *Ullman, supra*, 350 U.S. at 427, quoting *Maffie v. United States*, 209 F.2d 225, 227 (5th Cir. 1954). *See* L. Levy, *Origins of the Fifth Amendment* 432 (1968).

Moreover, and wholly apart from the constitutional basis of respondent's motion to suppress, its determination was of the greatest practical importance: it decided the outcome of the prosecution. The suppression hearing in this case was in fact "the only judicial proceeding of substantial importance" that occurred during the prosecution, and "the only one in which the important factual and legal issues in the prosecution were litigated." *Gannett Co., Inc. v. DePasquale*, ___ U.S. ___ , 99 S. Ct. 2898, 2933 (1979) (Blackmun, J., dissenting in part). This is not uncommon:

> In our criminal justice system as it has developed, suppression hearings often are as important as the trial which may follow. The government's case may turn upon the confession or other evidence that the defendant seeks to suppress, and the trial court's ruling on such evidence may determine the outcome of the case.

Gannett, supra, 99 S. Ct. at 2914 n.1 (Powell, J., concurring).

Thus, while guilt or innocence is not directly at issue in a suppression hearing, it is, in a case like this one, effectively determined. As the Court of Appeals properly stated, the individual's interest is a compelling one. *Cf. In re Winship*, 397 U.S. 358, 363 (1970).[26]

b. **Likelihood of error.** As shown above, Raddatz' interest in this case is a liberty interest under the Fifth Amendment in avoiding the admission of coerced self-incriminatory statements and in avoiding subsequent conviction based on those statements. The administrative due process decisions next direct inquiry into the likelihood of an erroneous decision under the procedures being challenged, resulting in a deprivation of this individual interest. In this case, the question is whether the district judge is likely to make an erroneous determination of credibility if he does not observe the witnesses testify.

As a vast body of precedent applicable to judicial proceedings has recognized (see pp. 44-47, *supra*), credibility cannot be determined accurately without consideration of demeanor evidence. Indeed, in deciding administrative

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[26]The Government argues (Gov. Brief at 46-48) that this Court has minimized the importance of the private interests at stake in suppression hearings, citing *Lego v. Twomey*, 404 U.S. 477 (1972); *United States v. Matlock*, 415 U.S. 164 (1974); and *McCray v. Illinois*, 386 U.S. 300 (1967). None of these decisions, however, deprecates the importance of the right against self-incrimination or the individual interest in avoiding criminal conviction. Rather, the decisions turn on the compelling interest of the Government in being able to introduce all competent evidence at a criminal trial. In the present case, the procedural protection sought – personal observation of witnesses by the district court – does not impair any interest of the Government in regard to criminal prosecution. This issue is discussed more fully at pp. 54-56, *infra*.

due process cases, this Court has insisted upon personal observation of witnesses by the trier of fact wherever credibility determinations are critical. In *Goldberg v. Kelly*, 397 U.S. 254, 268 (1970), the Court struck down the procedures by which the City of New York terminated welfare benefits because they did not permit welfare recipients "to appear personally . . . before the official who finally determines continued eligibility." The Court explained, "Particularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." 397 U.S. at 269. In *Mathews v. Eldridge*, on the other hand, the Court declined to require an opportunity for personal observation of witnesses in cases of social security benefit termination, in large part because the issues in these cases turn upon medical evidence, in which "the specter of questionable credibility and veracity is not present." 424 U.S. at 344, quoting *Richardson v. Perales*, 402 U.S. 389, 407 (1971). *See also Califano v. Yamasaki*, ___ U.S. ___, 99 S. Ct. 2545, 2555 (1979). In the present case (see pp. 40-44, *supra*), and in motions to suppress incriminatory statements generally, credibility questions are often determinative. *Davis v. North Carolina*, 384 U.S. 737, 741 (1966); *Culombe v. Connecticut*, 367 U.S. 568, 603 (1961) (Frankfurter, J., announcing the judgment of the Court):

> Determination of [whether a confession is involuntary] requires assessments of the relative credibility of witnesses whose stories, in cases involving coercion, are frequently, if not almost invariably contradictory.[27]

[27] Justice Frankfurter's opinion in *Culombe* goes on to state that the ascertainment of credibility in such cases "belongs to the trier of facts before whom those witnesses actually appear." 367 U.S. at 603.

Indeed, in *Jackson v. Denno*, 378 U.S. 368, 391 (1964), this Court recognized that its own record review was "an inadequate substitute for a full and reliable determination of the voluntariness issue" in a motion to suppress. A district judge is no more able than this Court to make an adequate determination of a motion to suppress solely by reading a hearing transcript.

The Government does not appear to argue to the contrary. Instead, it primarily argues, in effect, that the accuracy of the district judge's decision on the facts is not important, that no injustice is done in any event if his findings accord with those of the magistrate, who did see the witnesses. (Gov. Brief at 43-45, 49-50.) This argument, however, renders wholly meaningless the statutory directive of de novo determination by the district judge, which, as conceded by the Government, requires the judge to make independent findings, without deference. If the judge is in fact to decide independently, he must have a basis for doing so. The judge must be able to conclude reasonably whether a magistrate's assessment of credibility was right or wrong. He can do so only by hearing the conflicting witnesses.[28]

[28] This is, in effect, the holding of *United States v. Bergera*, 512 F.2d 391, 392-394 (9th Cir. 1975). In this case, decided before the 1976 amendments to the Magistrates Act required de novo determination of contested factual issues, the court of appeals held that unless the district court relies on the factfinding of the magistrate (which it may no longer do), "it must itself hear the testimony and see the evidence before deciding the motion." 512 F.2d at 394.

The Government makes an additional argument (Gov. Brief at 51) that rehearing of witnesses by the district judge might itself produce inaccurate decisions because the witnesses will have had the opportunity to "rehearse" their testimony in the hearing before the magistrate. Such rehearsal hardly prevents effective cross-examination. *See Rouse v. United States*, 359 F.2d 1014, 1016

[footnote continued]

The Government also argues that administrative agencies routinely engage in *de novo* determinations of credibility on the basis of record review of hearings conducted by administrative law judges. (Gov. Brief at 51-53.) This is incorrect; administrative agencies, unlike the trial judge below, are entirely free to defer to the findings of those who heard the witnesses. None of the statutes or regulations cited by the Government requires an administrative agency to make a *de novo* determination of anything. The tradition of administrative law is entirely to the contrary:

> The agency is free to adopt the examiner's recommendation with as little attention to the case as it cares to give. An agency having full confidence in the integrity and ability of a particular examiner may readily accept his recommendations, and when this happens, the effective power may be largely transferred to the examiner.

K. Davis, *Administrative Law Text* §10.04 at 222 (1972 ed.)

Indeed, the courts have taken steps to assure that agencies have access to reliable credibility determinations in cases where credibility is important, by requiring that the administrative law judge who prepares proposed findings actually hear the witnesses. *Gamble-Skogmo, Inc. v. FTC*, 211 F.2d 106, 113-115 (8th Cir. 1954); *Board of Pharmacy v. Feldman*, 279 F.2d 821 (D.C. Cir. 1960); *Van Teslaar v. Bender*, 365 F.Supp. 1007, 1012 (D. Md. 1973); *see* 2 K. Davis, *Administrative Law Treatise* §11.18 at 113 (1958).

(D.C. Cir. 1966) (police officer's change of testimony at trial provokes further doubt abut testimony at hearing on motion to suppress). Moreover, the Government's argument would call into question the value of demeanor evidence of witnesses who appeared at a preliminary hearing or a prior trial - all of whom are required to be "reheard" if available. *See Berger v. California*, 393 U.S. 314, 315 (1969).

Moreover, administrative agencies cannot ignore the findings of their hearing officers where credibility is critical. In these cases, where an agency has no demonstrable reason for not adopting the hearing officer's findings, the courts have repeatedly refused to enforce agency orders. *Bon-R Reproductions, Inc. v. NLRB*, 309 F.2d 898, 907 (2d Cir. 1962); *Ward v. NLRB*, 462 F.2d 8, 12 (5th Cir. 1972); *Loomis Courier Services, Inc. v. NLRB*, 595 F.2d 491, 495-96, 499 (9th Cir. 1979). The court in *Bon-R* noted:

> A determination of intent by demeanor evidence is a common occurrence in our trial courts. This being precisely the kind of issue as to which demeanor evidence is relevant, the examiner's finding should accordingly be given "special weight."

309 F.2d at 907. *See Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494-97 (1951). The administrative cases fully support the basic proposition that credibility cannot be accurately determined by a decisionmaker who has not viewed the witnesses.[29]

c. **The governmental interest.** The final factor to be weighed under the administrative due process decisions is

[29]This conclusion is not contradicted by the language in *Utica Mutual Insurance Co. v. Vincent*, 375 F.2d 129, 132 (2d Cir.), *cert. denied*, 389 U.S. 839 (1967) that "the due process clause does not require under all circumstances that factual determinations be made by the person hearing the evidence." (quoting dicta from *United States v. Vater*, 259 F.2d 667, 673 (2d Cir. 1958)). *Utica Mutual* dealt with an NLRB determination of the proper unit for a representation election, an issue which the court held need not even be decided at an adjudicatory proceeding because the investigation was "essentially informal, not adversary." 375 F.2d at 129, 133, quoting *Inland Empire Dist. Council, etc. v. Millis*, 325 U.S.

[footnote continued]

the governmental interest at stake in the proceedings. In this case, the question is whether the Government's interest is sufficiently compelling to justify procedures which create a substantial risk of an erroneous decision on an issue of fundamental constitutional right. There are two distinct governmental interests involved here, neither of which justified the procedures employed below.

First, the Government has an interest, as prosecutor in a criminal case, in seeing that all properly obtained evidence is utilized. This interest is not impaired by requiring the district judge to view the witnesses. In the present case, a trial judge, on the basis of record review, resolved credibility questions in the Government's favor. In other cases, however, he will resolve such issues against the Government. Requiring observation of conflicting witnesses cannot, in the abstract, disadvantage either party. It is a neutral procedure, advancing both parties' interest in an accurate determination.

This case thus contrasts sharply with cases in which the Government's prosecutorial interests in a suppression hearing were at stake. In *Lego v. Twomey*, 404 U.S. 477 (1972), for example, the petitioner argued that the Government should bear the burden of proof beyond a reasonable doubt at a suppression hearing. Had this Court agreed, many statements voluntarily given to police

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133, quoting *Inland Empire Dist. Council, etc. v. Millis*, 325 U.S. 697, 706 (1945). *See* K. Davis, *Administrative Law Text* §7.03 at 161 and 161 n. 7 (1972). In *United States ex rel. Graham v. Mancusi*, 457 F.2d 463 (2d Cir. 1972), Judge Friendly, the author of *Utica Mutual*, noted that "cases emphasizing the importance of demeanor as an aid to the determination of credibility are too numerous and well-known to require extended citation," that such cases were rooted in due process, and that the rule of *Utica Mutual* was simply a "qualification . . . recognized for certain civil and administrative proceedings." 457 F.2d at 469.

would have been excluded because the trier of fact had a reasonable doubt about their voluntariness. This would have seriously impaired the prosecution's interest "in placing probative evidence before juries." 404 U.S. at 489. Moreover, it would not have ensured that suppression decisions were more accurate, only that the risk of inaccuracy was disproportionately borne by the Government. The Court's decision not to require proof beyond a reasonable doubt was responsive to the Government's compelling interest.

Similarly, in *Brinegar v. United States*, 338 U.S. 160 (1949), *McCray v. Illinois*, 386 U.S. 300 (1967) and *United States v. Matlock*, 415 U.S. 164 (1974), where this Court approved of evidentiary practices in Fourth Amendment suppression hearings less rigid than those ordinarily employed at trial, contrary rulings would have impaired the Government's ability to prove that a particular arrest or search was proper, thus excluding probative evidence at trial or terminating the prosecution. In each case, the Court ruled that there was ample basis in the record for establishing the reliability of the evidence in question.[30]

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[30] *Brinegar* allowed the trial judge in hearing a motion to suppress to consider evidence which might have been inadmissible in a jury trial. The reliability of the evidence (testimony concerning a prior arrest) was not in dispute. 338 U.S. at 173. *McCray* allowed police officers to testify concerning the information they received from an informant without disclosing his identity. The officers testified personally, however, and were subject to cross-examination; it was their credibility that was at issue in the hearing. 386 U.S. at 313. *Matlock* allowed introduction of hearsay statements by a woman who lived with the defendant. The woman testified on the defendant's behalf and so was available for questioning on the matter; moreover, the statements she gave were against her penal interest. 415 U.S. at 175-177.

Moreover, the Court stressed in each case that the evidentiary decisions would be made by the judge who decided the motion to suppress. 338 U.S. at 172-173 (judge able to consider prejudicial evidence for limited purpose); 386 U.S. at 313 ("The judge was obviously satisfied that each [police officer] was telling the truth, and for that reason he exercised [his] discretion . . . to respect the informer's privilege."); 415 U.S. at 175 ("There is . . . much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence . . . [he] should receive the evidence and give it such weight as his judgment and experience counsel.") Thus, even in cases which involved the Government's interest in effective prosecution, the Court did not sanction inaccuracy in factfinding, and surely did not intimate approval of a procedure which would remove the judge from a position in which he can make personal determinations of witness credibility. In the present case, where the Government's prosecutorial interest is not impaired, there is much less reason to allow such a procedure.

The second governmental interest involved in this case is efficiency in judicial administration. The Government argues that rehearing of witnesses by the district court should never be required because "[t]he consequent cost in terms of increased court congestion is simply too high a price to pay for the minimal benefits, if any, that would be derived from a two-hearing requirement." (Gov. Brief at 56-57.)

The Government's argument is mistaken, first, in characterizing as minimal the "benefit" of rehearing witnesses on disputed questions of fact where credibility is determinative. This procedure is, to the contrary, essential for any accurate determination by the district judge, whom both the Magistrates Act and Article III require to decide

suppression motions independent of a magistrate's recommendation. Of course, a rehearing imposes additional expense, but when a fundamental right like that against self-incrimination is at stake, concerns of economy cannot be determinative. *Bloom v. Illinois,* 391 U.S. 194, 209 (1968) (right to jury trial for serious criminal contempt enforced despite sacrifice of "efficiency, expedition, and economy"); *Stanley v. Illinois,* 405 U.S. 645, 656 (1972) (requiring hearing to determine unwed father's right to custody because "the Constitution recognizes higher values than speed and efficiency"). The point was forcefully stated by Justice Black in *Reid v. Covert,* 354 U.S. 1, 14 (1957):

> The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.

In addition, the Government errs in its assessment of the extent of the burden which would actually be imposed by the requirement of rehearing conflicting witnesses in cases like the present one.

First, hearings on motions to suppress assume only a small portion of the time of district judges. While there appears to be no definitive estimate of the time spent by district judges in hearing suppression motions, a recent two-month study by the General Accounting Office determined that suppression motions were filed in only 16% of all criminal cases, and that fewer than one quarter of these were motions to suppress confessions. *Impact of the Exclusionary Rule on Federal Prosecutions,* Report by the Comptroller General of the United States 1 (April

19, 1979). The study also indicated that the resources expended for hearings on Fourth Amendment suppression motions (the only motions examined in this respect) "were modest when compared with the total resources used in the criminal justice system." *Id.* at 1-2.

Second, magistrates themselves appear to be expending relatively little time in the type of hearing involved in the present case. During the twelve-month period ending on June 30, 1979, magistrates throughout the United States conducted only 560 evidentiary hearings in criminal cases. *1979 Annual Report of the Director of the Administrative Office of the United States Courts* A-150 and A-151 (Table M-5). This compares to magistrates' disposition of 69,798 matters pursuant to 28 U.S.C. §636 (a), including issuance of warrants, preliminary examinations, and bail proceedings (*id.* at A-142 and A-143, Table M-3); to their disposition, without hearings, of 40,131 criminal matters and 78,917 civil matters pursuant to 28 U.S.C. § 636 (b), including 1,604 case-dispositive and 9,581 non-dispositive motions in criminal cases (*id.* at A-144 through A-149, Table M-4); and to their disposition of 100,267 minor and petty offenses. (*id.* at A-134, Table M-1.)

Third, of the relatively few (560) hearings which magistrates have conducted in criminal cases, many would not require rehearing by a district judge because they were not case-dispositive, because they did not involve critical issues of credibility, or because the magistrate's findings which resulted from them were not challenged by any party.

Fourth, even under the Government's view, judges may decide in their discretion to rehear the testimony of witnesses whose credibility is in issue when that testimony is critical to the determination of a case-dispositive matter.

The savings posited by the Government occur only when judges choose not to do so.

Fifth, and finally, even a process of "thorough" record review, advocated by the Government, is time-consuming. The district judge must not only read the transcript, he must ponder the competing testimony in an attempt to determine which is more credible. Unless the judge simply signs the magistrate's recommended order, he must involve himself in an effort of considerable difficulty and magnitude.[31]

Undoubtedly there would be some saving of the resources of the judiciary if district judges were allowed to decide case-dispositive motions to suppress involuntary statements, where credibility is crucial, merely by reading a transcript of a hearing. But this saving would be, from all objective indications, both speculative and small. It hardly provides the basis for injecting arbitrariness into decisions on fundamental constitutional issues.[32]

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[31] After passage of the 1976 amendments to the Magistrates Act, which are in issue in this case, Congress continued its hearings on the most effective means of employing magistrates. At these hearings, several witnesses urged Congress not to require district judges to hear appeals from civil cases tried by magistrates, noting that it is more efficient for district judges to try cases themselves than to act in an appellate capacity. *See Magistrates Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcommittee on Improvements in Judicial Machinery of the House Committee on the Judiciary,* 95th Cong., 1st Sess. (1977) at 93 (remarks of Hon. Otto R. Skopil, Jr.); 121 (remarks of Robert Acomb, Esq.); 115-116 (remarks of Hon. Morey Sear).

[32] Much greater savings can be expected under the 1979 amendments authorizing magistrates to conduct civil trials with the consent of the parties. Experience with consensual references under the 1976 amendments has been successful in many districts. *See, e.g., The Federal Magistrates Act of 1979, S. 237: Hearing Before the Subcomm. on Improvements in Judicial Machinery of*

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III.

RADDATZ WAS CONSTITUTIONALLY ENTITLED TO A MEANINGFUL DETERMINATION OF HIS MOTION TO SUPPRESS BY AN ARTICLE III JUDGE.

As discussed in Section I above, the Magistrates Act expressly required the district judge in this case to make a de novo determination of the contested issues in the magistrate's report. If that statutory directive is interpreted according to its terms, requiring the judge to make a meaningful independent determination, this case raises no issue under Article III of the Constitution.

The Government, however, engages in a lengthy argument to the effect that Congress has unrestricted power to divest the lower federal courts of all their judicial power and vest it instead in state courts and legislative tribunals. (Gov. Brief at 30-37.) From this basis, the Government argues that Raddatz had no constitutional right to an Article III determination of his motion, implying that the de novo determination requirement of the Magistrates Act is of little importance.

The Government's argument is thoroughly mistaken. Congress' power to vest jurisdiction in state courts does

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the Senate Comm. on the Judiciary, 96th Cong., 1st Sess. 17 (1979) (Statement of Hon. Otto R. Skopil); *Magistrate Act of 1977: Hearings on S. 1612 and S. 1613 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 95th Cong., 1st Sess. 28 (1977) (Statement of Peter McCabe.) Moreover, requiring the parties' consent before the magistrate can try a civil case, among other things, serves to meet the problem of the "unevenness in the ability of magistrates to perform their tasks." *Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings Before The Subcomm. on Courts, Civil Liberties, and The Administration of Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 27 (1977) (Statement of Hon. Griffin B. Bell).

not give it power to vest jurisdiction in non-Article III federal courts, and Congress has no authority under Article I of the Constitution to establish legislative tribunals with general jurisdiction to decide criminal or constitutional questions. Congress has in fact chosen to have the federal judiciary decide federal criminal cases. 18 U.S.C. §3231. Having made that choice, Congress could not allow dispositive matters to be decided by any but Article III judges. The requirement of an independent de novo determination in section 636 (b) (1) (C) of the Magistrates Act is of constitutional importance.

A. The Power Of Congress To Grant To State Courts Jurisdiction Over Federal Criminal Cases Does Not Establish Any Power To Vest Jurisdiction In Non-Article III Judicial Officers.

The Government argues that because Congress has the power to dismantle the system of inferior federal courts and require state courts, not constituted in accordance with Article III, to enforce federal criminal statutes, Congress could provide for the determination of federal criminal matters by non-Article III federal officers. (Gov. Brief at 33.) This contention is unfounded. As the Government recognizes, the permissive and flexible nature of Congress' Article III power to constitute inferior federal courts reflects a fundamental policy decision by the framers of the Constitution concerning the allocation of state and federal power in the federal system. (Gov. Brief at 30.) The purpose of making congressional power under Article III permissive rather than mandatory was to permit Congress to preserve a wider field for state judicial power, not to permit it to expand federal judicial power in a manner inconsistent with Article III. *See* 2 Farrand, *The Records of the Federal Convention of 1787* 45-46 (1911); P. Bator, *et al.*, *Hart and Wechsler's The Federal Courts and The Federal System* 11-12 (1973). As this

Court has stated, the fact that state courts may adjudicate federal issues is no argument for the proposition that sitting federal courts can abdicate their responsibility to adjudicate federal issues, particularly federal constitutional issues, which come before them. *Zwickler v. Koota*, 389 U.S. 241, 248 (1967). Moreover, the vesting of federal criminal jurisdiction in the state courts poses no threat to the constitutional scheme of separation of powers within the federal government, one of the framers' chief concerns in providing for the complete independence of the judicial branch. *See The Federalist*, No. 78 at 465-466 (Hamilton) (Rossiter ed. 1961).

This case has nothing to do with Congress' power to apportion judicial authority between state and federal courts. Rather, it involves the *federal* exercise of the judicial power of the United States in an Article III trial court, to which Article III clearly applies.

B. Congress Has No Authority To Create Article I Tribunals With General Jurisdiction To Decide Criminal Or Constitutional Issues.

Contrary to the Government's assertion, the Constitution does not empower Congress to create an Article I tribunal with general jurisdiction to decide criminal cases or constitutional questions. Congress may establish legislative courts only in the execution of one of its specific legislative powers. *See, e.g., American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828) (the jurisdiction of the territorial courts "is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States"); *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929) (customs courts are established pursuant to Congress' power to lay and collect

duties on imports, Art. I, §8, cl. 1);[33] *Williams v. United States*, 289 U.S. 553 (1933) (courts of claims are established pursuant to Congress' power to pay the debts of the United States, Art. I, §8, cl. 1); *Crowell v. Benson*, 285 U.S. 22, 56-64 (1932) (administrative tribunal may decide longshoreman's injury claim pursuant to the admiralty power of Congress);[34] *Reconstruction Finance Corp. v. Bankers Trust Co.*, 318 U.S. 163 (1943) (the Interstate Commerce Commission, established pursuant to Article I, §8, cl. 3, has authority to conduct railroad reorganization proceedings);[35] *Selective Draft Law Cases*, 245 U.S. 366, 377 (1918) (local draft boards have power to classify individuals for the selective service, established pursuant to Congress' authority over the military, Art. I, §8, cl. 11-16).[36]

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[33] Customs courts were subsequently established as Article III courts. *See Glidden v. Zdanok*, 370 U.S. 530, 584 (1962). The Court of Claims had a similar history. *See Williams v. United States*, 289 U.S. 553, 578-581 (1933); *Glidden, supra* at 584.

[34] For a discussion of the implication of legislative power over the subject of admiralty from history, the necessary and proper clause, and the constitutional grant of judicial power respecting "all Cases of admiralty and maritime Jurisdiction," Art. III, §2, *see Detroit Trust Co., v. The Thomas Barlum*, 293 U.S. 21, 42-44 (1934); Gilmore & Black, *The Law of Admiralty* 694 (2d ed. 1975).

[35] The Government contends that in conducting reorganizations, the Article I Commerce Commission is exercising an inherently judicial Article III power over bankruptcies. (Gov. Brief at 32.) However, congressional power under Article I, §8, cl. 4, to make uniform laws on bankruptcies, "and not the judicial power under Art. III, is the source of our system of reorganizations and bankruptcy." *National Mutual Insurance Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 594 (1949) (plurality opinion of Jackson, J.).

[36] The Government argues from *Selective Draft Law Cases* that a criminal prosecution in an Article III court can be based in part on factual determinations made by an Article I tribunal, a proposition which the Government itself concedes has been accepted by

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Similarly, it is the power "[t]o exercise exclusive Legislation in all Cases whatsoever" in the District of Columbia, Art. I, §8, cl. 17, that authorizes Congress to establish non-Article III courts to resolve cases, including criminal cases, involving laws applicable only to the District of Columbia. *Palmore v. United States*, 411 U.S. 389, 397-398 (1973); *see also Federal Radio Commission v. General Electric Co.*, 281 U.S. 464, 468 (1930); *Keller v. Potomac Electric Power Co.*, 261 U.S. 428, 442-444 (1923). Hence, this Court's statement that "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts," *Swain v. Pressley*, 430 U.S. 372, 382-383 (1977); *Palmore, supra*, 411 U.S. at 407, is not "applicable where laws of national applicability and affairs of national concern are at stake." *Palmore, supra*, 411 U.S. at 407-408.[37] Both *Swain and Palmore* involved District of Columbia statutes of strictly local applicability. *See Key v. Doyle*, 434 U.S. 59, 61-68 (1977) (a law applicable only in the District of Columbia is not a "statute of the United States" for purposes of 28

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the courts rarely and with caution. *See Estep v. United States*, 327 U.S. 114, 122-123 (1946), discussed by the Government at 36, and Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1381-1382 (1953). In any event, a case that stands for the proposition that Congress can establish an Article I tribunal in an area over which it has specific legislative power, such as the military, subject to limited review by an Article III court, does not support the Government's argument that Congress, where it has no such power, could establish a legislative court to exercise the general criminal and constitutional adjudicatory power of the United States.

[37]The requirements of Article III give way only in "proper circumstances . . . to accommodate plenary grants of power to Congress to legislate with respect to specialized areas having particularized needs and warranting distinctive treatment." *Palmore, supra*, 411 U.S. at 408.

U.S.C. §1257 (1)). Raddatz was prosecuted under a law of national applicability, and his motion to suppress alleged that agents of the United States Government violated his Fifth Amendment rights.

The Government specifies only one source of congressional authority to establish a legislative tribunal for criminal or constitutional matters – the power conferred by Article I, §8, cl. 9, "[t]o constitute tribunals inferior to the Supreme Court." (Gov. Brief at 35.) This Court, however has clearly denied that legislative courts are authorized by this clause. *See Glidden v. Zdanok*, 370 U.S. 530, 543 (1962): "The power given Congress in Article I, §8, cl. 9, 'To constitute Tribunals inferior to the supreme Court,' plainly refers to the 'inferior courts' provided for in Art. III, §1; it has never been relied on for establishment of any other tribunals."

Moreover, when Congress is exercising a specific legislative power, its power to supplant independent Article III courts with legislative tribunals is limited by the strictures of Article III and the special role of the independent judiciary under the Constitution. *See United States ex rel. Toth v. Quarles*, 350 U.S. 11, 15-16 (1955); *Reid v. Covert*, 354 U.S. 1, 21-22, 44, 70 (1957); *see generally* Note, *The Validity of United States Magistrates Criminal Jurisdiction*, 60 Va. L. Rev. 697, 715 (1974); Note, *Article III Constraints and the Expanding Civil Jurisdiction of Federal Magistrates: A Dissenting View*, 88 Yale L.J. 1023, 1031-1032 (1979).

In sum, Congress has no authority to vest the power to decide a motion to suppress involuntary statements in an Article I forum.

C. Because Jurisdiction Over This Case Was Vested In An Article III Federal District Court, Raddatz Was Entitled To The Constitutional Safeguards Of That Forum.

As shown above, the Government's arguments regarding Congressional power are mistaken. These arguments, moreover, have the effect of diverting attention from the critical constitutional consequences that flow from the fact that the Congress – regardless of whether it was compelled to do so – has in fact vested jurisdiction over the matters involved here in an Article III court. 18 U.S.C. §3231; 28 U.S.C. §636 (b) (1) (B).

The vesting of jurisdiction in a particular forum to a large extent determines the procedural rights that apply. *See Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 430 U.S. 442, 460-461 (1977); *Curtis v. Loether*, 415 U.S. 189, 195 (1974). The decision of Congress to vest jurisdiction over this case in an Article III court entitled Raddatz to the special constitutional attributes of that forum including the exercise of judicial power by a judge whose independence is ensured by lifetime tenure and a salary which cannot be diminished. U.S. Const. Art. III, §1; *see Glidden v. Zdanok*, 370 U.S. 530, 533, 536 (1962); *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 16 (1955).

Magistrates are not Article III judges. They are appointed by the judges of the district court for eight-year terms, in numbers and at locations established by the Judicial Conference. 28 U.S.C. §631 (a), (e). They can be removed by a majority of the judges of a district for such vague causes as "incompetency, misconduct, neglect of duty, or physical or mental disability." A magistrate's office can be terminated if the Judicial Conference "determines that the services performed by his office are

no longer needed." 28 U.S.C. §631 (h), *as amended*, §631 (i) (1979). Magistrates' rate of compensation may be raised or lowered at any time during a term provided it is not lowered below the salary fixed at the beginning of the term, and it is subject to diminution between terms. 28 U.S.C. §634 (b). These tenure and salary provisions, being statutory rather than constitutional, are not protected from legislative abridgment. *See Glidden v. Zdanok, supra*, 370 U.S. at 534. Hence, magistrates are dependent, to varying degrees, on the judges of their district, the Judicial Conference and Congress for their tenure and their livelihood.

The tenure and salary provisions of Article III serve two distinct purposes. First, they are intended to insure "the complete separation of the judicial from the legislative power." *The Federalist*, No. 79 at 472 (Rossiter ed. 1961); *see The Federalist*, No. 78 at 465-466; *O:Donoghue v. United States*, 289 U.S. 516, 530 (1933), quoting 1 Andrews, *The Works of James Wilson* 367 (1896). The tenure and salary protections of Article III are so important in the constitutional plan of separation of powers that this Court has held statutory grants of lifetime tenure and salary insufficient to satisfy Article III because statutes are subject to change at the will of Congress. *Glidden v. Zdanok, supra*, 370 U.S. at 534. Second, the tenure and salary provisions, and the judicial independence secured thereby, are "basic constitutional protections designed in part for the benefit of litigants." *Glidden v. Zdanok, supra*, 370 U.S. at 536; *see The Federalist, supra*, No. 78 at 466, 471.

While district courts have the power in civil cases to employ the assistance of such non-Article III personnel as auditors or masters, the permissible scope of such refer-

ences has been carefully circumscribed. *See LaBuy v. Howes Leather Co.*, 352 U.S. 249, 257-259 (1957).[38]

Article III was intended to establish a judiciary of uncommon talent, independence and character, in part because of its special responsibility for the determination of constitutional controversies. Rejecting the limited tenure provisions of contemporary state constitutions, Hamilton observed that the "complete independence of the courts of justice is peculiarly essential in a limited Constitution" where courts would be called upon to judge the compliance of coordinate brances of government with the Constitution. *The Federalist*, No. 78, *supra* at 466. He said:

> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.

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[38]The policy of the Constitution that the federal judicial power should be exercised only by judges protected by Article III safeguards is the underlying source of the restriction on the power of federal district court judges to make references to masters. As Judge Kaufman has written:

> The Chief factor militating against unrestricted references in the federal courts is the possibility that it may result in an abdication of the judicial function, exclusively reserved by the Constitution to the federal judiciary.

Kaufman, *Masters in the Federal Courts: Rule 53*, 58 Colum. L. Rev. 452, 453 (1958). The critical issue in determining the propriety of a reference is "the nature of the duties to be conferred by the reference." *Id.* at 457. Reference of matters involving the assessment of the credibility of witnesses is generally viewed as improper. *Id.* at 453 n.6. Matters such as accountings which require "no particular judicial talent or insight" can appropriately be referred. *Id.* at 457. In *LaBuy*, *supra*, the Court approved the use of a master to prepare an accounting "provided the circumstances indicate that the use of the court's time is not warranted in receiving the proof and making the tabulation." 352 U.S. at 259.

Id. at 470-471.

Of all the matters that come before federal judges, few involve them as immediately in the role of vindicating federal rights as motions to suppress confessions under the Fifth Amendment. Resolution of these motions requires experience, sophistication, and an understanding of the meaning and purpose of constitutional guarantees so that they can be properly applied in the extraordinarily varied factual circumstances motions to suppress present. *See, e.g., Brown v. Illinois*, 422 U.S. 590, 603 (1975); *Blackburn v. Alabama*, 361 U.S. 199, 207 (1960); *Haley v. Ohio*, 332 U.S. 596, 603 (1948) (Frankfurter, J., concurring). These motions must often be decided amid inflamed and hostile public feeling where an independent judiciary has a special function to serve. *See Chambers v. Florida*, 309 U.S. 227 (1940); *Nardone v. United States*, 308 U.S. 338, 342 (1939); *McNabb v. United States*, 318 U.S. 332, 346-347 (1943); *The Federalist*, *supra*, No. 78 at 469.

When James Madison proposed the adoption of the first ten amendments to the first Congress in 1789, he was confronted with the argument that these guarantees would be unenforceable and hence useless. In response, Madison stated:

> If [the protections of the Bill of Rights] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

Brant, *The Madison Heritage* and Black, *The Bill of Rights and the Federal Government*, quoting 1 Annals of Congress 439 (1834), in *The Great Rights* 36, 62 (E. Cahn ed. 1963).

In affording Raddatz an express statutory right to a de novo determination of his suppression motion by an Article III judge, Congress has respected the values which inform Article III. In light of that clear statutory directive and the importance of the Article III interests which would be compromised if the statute is not enforced according to its terms, the requirement of a de novo determination cannot be trivialized. The Magistrates Act should be construed to afford a meaningful de novo determination of contested issues and hence, a rehearing before the district court in the circumstances of this case. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974); *United States v. Johnson*, 323 U.S. 273, 275 (1944).

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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